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IN THE

Supreme Court of the United States

October Term 1944

No. 864

F. F. DOLLERT, ET AL,
Petitioners

v.

PRATT-HEWIT OIL CORPORATION, ET AL
Respondents

REPLY BRIEF OF PETITIONER, F. F. Dollert

To Reply of Respondent, Houston Oil Company of Texas

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FIRM FOUNDATION—AUSTIN

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Respondent in its reply several times interpolates the statement that petitioner's motion is merely "a motion for a new trial" and at other times calls it a bill of review. For example, on page 2 it is stated "petitioner contended in his Motion, being a Motion for a New Trial, that the judgment of dismissal was void on its face" etc., imputing that petitioner in-

tended his motion to be one for a new trial or a bill of review. Similar imputations are made on pages 14 and 15. Petitioner makes no such contention and says that it is neither a motion for a new trial nor a bill of review and cannot be, because such motions assume that the court had jurisdiction, which it did not have. The petitioner's motion to dismiss the action because the contract and the judgment are both void on their face means only one thing, that there never was a contract nor a judgment because the state district court never had jurisdiction of the subject matter or the parties except that it had the inherent power to strike from its records a case which never existed.

Through the entire reply there is a very much studied effort to draw the discussion away from a jurisdictional issue to one that is mere error in the trial of a case where the court had full jurisdiction of the parties and the subject matter.

The Houston Oil Company in this brief, as well as in every other brief it has filed, has never discussed the jurisdictional issue, namely, that the September 28, 1925 contract, the sole basis of this case, is void, and at no time could or did vest any interest in the Houston Oil Company, nor did the respondent at any time in its briefs, nor in this brief, discuss the several sub-issues, each one of which was sufficient to make the alleged contract and the pretended judgment of January 26, 1937, void.

The foregoing issues present jurisdictional ques-

tions. When they were presented to the Court it became the Court's duty to decide those issues before proceeding further. (See supporting brief, pp. 88-90). This, NONE OF THE COURTS DID. The Houston Oil Company has been in possession of the oil properties which are the subject of this litigation. The failure of the Courts to pass on these issues and thereby perform their duties as courts, that is, the trial court and the Court of Civil Appeals, necessarily has resulted, through such course of procedure, in the denial of the rights of the petitioner, his corporation and the other stockholders—a taking away and depriving them of their valuable oil properties WITHOUT ANY JUDICIAL DETERMINATION of the vital facts upon which alone such depredation could be justified. Thus, their said properties have been taken away from them AND GIVEN to the Houston Oil Company IN DIRECT VIOLATION of the due process clause of the Constitution of the United States.

Thus, at that point, namely, when the District Court of Refugio County and the Court of Civil Appeals REFUSED TO DETERMINE THE JURISDICTIONAL ISSUES presented by petitioner's motion the JURISDICTION OF THIS COURT WAS INVOKED.

Briefly stated, the following are the jurisdictional issues presented by petitioner:

1. The September 28, 1925 contract IS VOID because (a) it contains an unlawful dele-

gation of the managerial powers of the corporation to the directors of its competitor, the Houston Oil Company; (b) it violates the usury statutes of Texas; (c) it violates the anti-trust and monopoly statutes of Texas; (d) Thomas H. Pratt, the resident manager and official of the Pratt,-Hewit Corp., had forfeited his right to represent his corporation in the making of the alleged contract in having secret financial personal dealings with the Houston Oil Co. and its president in unusual large sums whereby Pratt put himself in a position where self-interest conflicted with the duty he owed his corporation.

2. The January 26, 1937 judgment is void because (a) the contract being void it follows, necessarily, that the judgment is void; (b) the judgment was dismissed with prejudice during VACATION TIME *without any notice* being given petitioner or any of the other stockholders, except the few who appeared at that hearing—through their attorneys—(this is a stockholder's action—each stockholder has a right to proceed with the case, of which right he could not be deprived without being given notice)—the Pratt-Hewit Corp. was not there and knew nothing about the hearing. Pratt and his private attorney J. V. Vandenburg, Jr., attempted to represent the Pratt-Hewit Corp. but, of course, could not because Pratt himself, was a defendant and the Pratt-Hewit Corp. was the true plaintiff because of conflict of Pratt's private interest with that of his corporation.

Even though neither state nor federal court has ever so much as mentioned the foregoing issues, respondent on page 14 of its reply says:

> "Petitioner's contentions that the contract was void, fraudulent, illegal, and violative of the Texas Anti-trust, Monopoly and Usury laws have been overruled in the State Court and Federal Court proceedings."

The phrase "have been overruled" definitely means that the Court has passed upon the issue by a written opinion and not by ignoring it.

Respondent in its reply, as in all its previous briefs, has never attempted to discuss the merits of these issues. It merely relates what the courts did in deciding against petitioner, which argument puts the "cart before the horse." It begs the issue. It assumes that which is in dispute, namely, the validity of the contract of September 28, 1925 and the judgment of January 26, 1937.

Petitioner's proposed amended petition and the facts therein contained are all a part of the motion. Here again in this reply the respondent does not dispute the facts charged against it, which are very serious in their nature, namely, that at the time of the making of the alleged contract, before and thereafter, Pratt was having secret financial dealings with the Houston Oil Co. and its president, all unbeknown to the stockholders of the Pratt-Hewit Corp., whereby the Houston Oil Co. and its president paid him a little more than $51,000 in cash and

secured for him an interest in a 200 acre oil lease for which Pratt PAID NOTHING and which became productive one-half month before the September 28, 1925 contract was made and has produced continuously since and is still producing, and from which he received until his death September 3, 1938, $125,000, or more. (Tr. R. 10-19). The failure of Pratt and the Houston Oil Co. to put of record the oil and gas lease assignments is sufficient proof that they knew the contract of September 28, 1925 was illegal and void.

By the foregoing, which is the truth, first, because proven by the records of the Houston Oil Co. and Pratt, and, second, because never denied by the Houston Oil Co., Pratt forfeited his right to represent his corporation before the contract was made. The Houston Oil Co., being a co-conspirator with him, it must take the consequences which follow, namely, it became a mere constructive trustee of the property it unlawfully took possession of under the unlawful contract with the Pratt-Hewit Corp., the cestui que trust.

While the fraud, and the bribery, and the buying of the discretion of Pratt cannot be disassociated from the acts which the Houston Oil Co. admits the situation presents this issue: the contract is void because Pratt by these secret dealings placed his personal private financial interests in conflict with the duty he owed his corporation, when he instanter forfeited his right to represent it. This issue of conflict of private interests with duty is

not mentioned or referred to in Respondent's Reply, nor is it spoken of, or mentioned, or denied in any pleadings of the Respondent or the Pratt-Hewit Corp. It is not mentioned in the Refugio County district court's judgment or by the Court of Civil Appeals. Likewise, the United States District Court in its Findings of Fact and Conclusions of Law makes no finding on the question of whether or not Pratt had placed himself in a position where his private interests conflicted with his duty. (F. Tr. R. pp. 509-520). Then, too, the United States Circuit Court of Appeals makes no mention of this issue. (132 Fed. (2d) 748) The Houston Oil Company, the State District Court, The Court of Civil Appeals, and the United States Circuit Court, all take the position that because the United States District Court found "that there is no evidence of fraud, no credible evidence of fraud, before me on the part of either Thomas H. Pratt or W. E. Hewit" (F. Tr. R. p. 516) that completely determines the case.

The foregoing is not only an error of law but completely ignores petitioner's issue that Pratt through his secret dealings with the Houston Oil Co. had forfeited his right to represent his corporation due to conflict between self-interest and duty, irrespective as to whether or not there was any fraud. Courts have universally held in Texas and all other states and the Federal Courts, namely, that an officer's right of representing his corporation ceases the moment conflict of interest arises between personal interest and duty, irrespective as to whether it is

accompanied with fraud. This is discussed in the supporting Brief with citations from Texas and from other states on pages 72 to 82, inclusive.

Respondent's Reply, p. 3:

> "The Federal District Court after trial held that there was no evidence of fraud or **illegality** and that the order of dismissal with prejudice was not void and that the plea of res judicata should be sustained."

is error, in that the word "illegality" which undoubtedly refers to the contract, was not mentioned at all in the Federal District Court's Findings of Fact and Conclusions of Law. That phrase, "fraud and illegality" is used several times in Respondent's reply intending thereby to convey that the legality of the contract had been passed upon, when in fact it never has been by any court.

The contract, being void, because prohibited by Texas statutes, and because made by Pratt for his corporation after he had disqualified himself by placing self-interest in conflict with his duty, makes entirely immaterial the findings of the Federal District Court, the Circuit Court of Appeals, the State District Court, the Court of Civil Appeals, and the Supreme Court of Texas. Likewise, what was said by attorneys is all immaterial for there is *no power* of any kind, *or act* of anyone, or of the courts, or attorneys, or of a legislature, that *can breathe any life into a void contract or a void judgment*. For

authorities and discussion of void judgment see supporting Brief, pp. 3-4.

Likewise, an illegal contract is not subject to ratification, and res judicata has no application when judgment is void. For authorities see p. 94 of supporting brief.

On page 12 of Respondent's Reply it says that petitioner has pointed out that no law of Texas was involved in this case and, therefore, the State Court did not and could not abridge "privileges and immunities" belonging to petitioner as a citizen of the United States. This entirely misconceives the law applicable, because the Respondent's statement assumes that the immunities and privileges of a citizen of the United States can be abridged only by the law of the state when the courts have universally held, that is, the Supreme Court of the United States, that whenever the state through any of its agencies or departments, whether by its legislatures or its courts, or other departments of government, abridge the privileges or immunities of a citizen of the United States, the 14th Amendment of the Constitution of the United States is involved.

The privileges and immunities of a citizen of the United States are extensive and one of them is the right to resort to the courts for protection without restriction. What these privileges and immunities are is discussed in authorities cited on pages 43-45 in the supporting brief.

6(a) On pages 4 and 5 of Respondent's Reply, the case of Consolidated Cause No. 1154, styled A. D. Rooke, et al., v. H. M. Allen and Houston Oil Company, is referred to. Respondent says "That case involved incidentally the validity of the Joint Operating Contract."

This is an erroneous statement of the nature of the action. Rooke had given a lease to the Pratt-Hewit Oil Corp. of some 1200 acres, consisting of three separate tracts. Pratt and Hewit, having no money with which to promote the oil venture, sold oil and gas lease acreage, which is real estate, out of two of these tracts to the 400 stockholders for the purpose of raising money and thereby evading the Security Law of Wisconsin. This was along in 1921, 1922, and 1923. There was no oil or gas production in Refugio County at that time, it was the wildest of wildcat territory, therefore practically worthless, yet acreage was sold at from $25 to $100 per acre (Fed. Tr. R. 609) to Wisconsin buyers who knew nothing about the oil business. $400,000 or more was raised in that manner. ((See Tr. R. pp. 6-9) No development work in the way of drilling wells had ever been attempted on two of the large tracts of the Rooke lease in which the stockholders owned lease acreage. Consequently, in 1933 Rooke commenced an action to cancel the lease and was required to make the lessee and the sub-lessees defendants. The Pratt-Hewit Corp. and all its stockholders who owned acreage and the Houston Oil Company were made defendants. It was plain that the validity of the September 28, 1925 contract was

not in issue. That litigation was concluded in 1938, a year before stockholders Wert T. Reed and the petitioner, learned of the secret financial dealings between Pratt and the Houston Oil Company.

Whether or not the validity of the contract had been in issue is wholly immaterial for, as is the universal rule everywhere, no court or no party can vitalize a writing which is void on its face.

Respondent, on page 3 of its reply says; "on the hearing of the motion there was introduced no evidence of fraud or illegality in the contract." All the facts and all the evidence, are set out in detail in petitioner's proposed amended petition which was made a part of the motion and is a part of the record. No one denied these facts. The Respondent was in no position to deny the facts alleged in said petition because they are taken from the records in the office and from its contracts and oil and gas lease assignments, etc. Therefore, for this motion and for this application for certiorari those facts, according to Rules of Procedure and of evidence, must be taken as speaking the truth.

In several places in Respondent's reply, particularly on page 2 thereof, it makes a statement like the following: (speaking of the judgment of January 26, 1937) "dismissed with prejudice entered at the request and agreement of all parties" also see similar Statement on page 15. The Respondent knows that there was no one there in person or by representative, except those mentioned on the rec-

ord which gives a complete statement of what took place on January 26, 1937. (Tr. R. 32-37, incl.). The same record is also to be found, but in a slightly different order, on pages 223-228, Federal Transcript of Record.

There is nothing in the record to show that petitioner was present in person or by attorney. In the Federal Court he testified that he knew nothing about the dismissal until eighteen months thereafter. (Fed. Tr. R. p. 804) Nor is there any thing in the record to show that any of the 400 stockholders were there in person or by attorney, except five of them who were represented by an attorney.

Even the Pratt-Hewit Corp. was not there, that is, was not represented by anyone, because Pratt and J. V. Vandenberg, Jr., Pratt's private attorney who tried to represent Pratt's corporation, were disqualified because Pratt's corporation was the true plaintiff. Therefore, such attempted representation by Pratt a defendant and his attorney was no representation. The record shows this.

This was a stockholder's action—the stockholders were all plaintiffs—they had a right and an interest in the litigation, which could not be taken away without notice of some kind. This occurred in VACATION TIME. Most of the stockholders lived in Wisconsin. There is nothing in the record which shows that notice had been given to ALL the stockholders through court order or otherwise.

Furthermore, the quotation from Respondent's reply, just given, is a plain mis-statement. The judgment does not state that the 400 stockholders were present or represented by attorneys or were even given notice that the case was to be taken up in vacation time and dismissed with prejudice. The following is part of the judgment.

> "Be it remembered that on this the 26th day of January A.D., 1937, in vacation and upon the request and agreements of the plaintiff, the interveners, and the defendants herein this cause came on for hearing whereupon plaintiff, interveners, *and defendants all* requested the Court to dismiss this suit from the docket of this Court with prejudice but at the cost of the defendants." (Tr. R. 35-36)

A stockholder, under proper conditions, may bring a suit in behalf of his corporation and all the other stockholders similarly situated, and has a right to prosecute the action to judgment, providing it is carried on in good faith. However, such right, when so exercised, does not give such stockholder who brings the action the right to step into court in vacation or any other time and join the defendants in dismissing the action, and particularly with prejudice, without the court or someone else having apprised all the stockholders of what was contemplated to be done. Such a practice, if permitted, would open the door to most gigantic frauds and constitute a violation of the due process clause of the 14th amendment to the Constitution of the United States.

as so clearly and forcefully pointed out by this Court in the case of Hansberry v. Lee, 311 U. S. 32.

Respondent, in several places in its reply, refers to the September 28, 1925 contract as "a joint operating contract" (pp. 4 and 5). That is a misnomer. When under the contract the Houston Oil Co. alone was given the right to drill and develop the acreage, to decide when and where new wells should be drilled; when it alone had the right to market and fix the price at which the gas and oil should be sold and to whom; and when it has been shown they sold it to the Houston Pipe Line Company, its alter ego; where it sat on both sides of the bargaining table in fixing the price and all that was left for the directors of the Pratt-Hewit Corp. to do was to distribute whatever the Houston Oil Co. gave them—that certainly cannot be called "a joint operating contract." See supporting brief, pp. 45-49, inclusive.

Respondent closes its Reply by quoting the following: "There should be an end to litigation." That slogan cannot apply in any case where trial and appellate courts which have jurisdiction to pass upon the merits of a case HAVE REFUSED to pass upon and determine fundamental issues, jurisdictional, and others, when such refusal necessarily means taking one man's property and giving it to another without a judicial determination.

The litigation in this case has never been com-

pleted because the main issues have never been passed upon but have been IGNORED by the courts.

This case, as shown on pages 75 to 79 of the supporting brief, shows that the conflict between self-interest and duty of which Pratt was guilty commenced two or three months before the September 28, 1925 alleged contract was entered into and continued every day through the remainder of his life, and thereafter through his son George Pratt and his son-in-law, M. A. Shaw, as officers and directors of the Pratt-Hewit Corp. Every month when they receive a check and accept it, including the one they received this month, presents a continuation of the conflict of interest and is a new offense against the Pratt-Hewit Corp., its stockholders, and this petitioner, out of which cause of action may arise. This is plainly explained and set out in the opinion of Mr. Justice Holmes in the case of United States v. Kissell, 218 U. S. 607, 608, 31 S. Ct. 124, 126. See supporting brief p. 78.

Every day, even while this case is pending before this Honorable Court, the property of the Pratt-Hewit Corp., its stockholders and this petitioner is being given away to the Houston Oil Company, without there having been any JUDICIAL DETERMINATION OF THE RIGHT OF THE HOUSTON OIL COMPANY TO TAKE THIS PROPERTY, ALL IN VIOLATION OF THE DUE PROCESS CLAUSE of the 14th Amendment of the United States Constitution. Every day that the Houston Oil Co. takes a part of this gas and a part of this oil

to itself without such right being determined by a court, DIRECTLY INVOKES THE JURISDICTION OF THIS COURT. Fayerweather v. Rich, 195 U. S. 276. See supporting brief, p. 35.

Respondent says, "The litigation must end." But Respondent's unlawful taking of the Pratt-Hewit Corp's oil and gas, unmolested by courts of justice as long as oil or gas or other minerals may be produced from the corporation's leases, must continue.

WHEREFORE, petitioner prays that his application for writ of certiorari be granted.

Respectfully submitted

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